
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER D. LEE**APPELLANT****V.****CASE NO.: 2014-CA-00475****MGM RESORTS MISSISSIPPI, INC. d/b/a
GOLDSTRIKE CASINO & RESORT – TUNICA and
ADRIAN THOMAS****APPELLEES**

MOTION FOR REHEARING

COMES NOW the Appellant, by and through undersigned counsel, and respectfully requests this Honorable Court rehear this matter and submits the following in support thereof, to wit:

1. The Appellant would respectfully request the Court rehear this matter regarding the trial court's denial of Plaintiff's Motion regarding Spoliation, the trial court's exclusion of defendant's Interrogatory Responses and deposition testimony of Adrian Thomas, and the trial court's entry of a Directed Verdict at the close of Plaintiff's proof as to all claims.

SPOILIATION ¹

2. Appellant respectfully requests the Court review this issue ² and the following rulings:

¹ See R. 00027-00045 (Plaintiff's Spoliation Motion).

² On January 17, 2014, Plaintiff's Second Motion In Limine was filed with the trial court. In the Motion, Plaintiff requested an order of the trial court instructing the jury to apply the maxim of *omnia proesumuntur in odium spoliatoris* in regards to the destruction or suppression of certain video footage involving the Plaintiff, Chris Lee, the Defendant Adrian Thomas, and the initial contact between the two at the "stage bar" at the Goldstrike Casino on the night in question and to thereafter instruct the jury that such destruction or suppression raises the presumption that the missing video footage would have been unfavorable to the party responsible for its loss, which was Goldstrike Casino.

a. *Lee interprets Thomas's deposition testimony as describing a different video that Gold Strike never produced in discovery in this case. Lee believes that this "missing" tape showed events in or around the Stage Bar. ¶16. However, having carefully compared Thomas's testimony to the videos in evidence, we are unable to reach the same conclusion as Lee. While Thomas's testimony is ambiguous, it seems to describe the videos that were produced and that are in evidence.*

b. *In any event, Lee has misinterpreted Thomas's testimony to at least some degree because Thomas was clear that the video was of him talking to Lee only after Young and Lee were already separated, not the initial dispute between Young and Lee.*

c. *Moreover, whatever the video depicts, the record indicates that it was turned over to the sheriff's department, not "lost or destroyed."*

d. *Finally, Gold Strike's risk manager testified that the casino complied with state law requiring it to maintain surveillance videos for fourteen days and produced all relevant video in its possession when Lee sent them a request to preserve video evidence approximately three months after the incident.*

3. In regards to the first point, Appellant would respectfully submit the video footage described by Adrian Thomas in his deposition ³ was never produced by the Defendants, and this is evidenced and confirmed by counsel for Gold Strike both in the deposition itself ⁴ and in defense counsel's later correspondence on the subject. ^{5 6} Several parts of Adrian Thomas's deposition testimony make it clear that the video described in his deposition is different from any video produced by the Defendants and presented at trial. Specifically, during this exchange, Adrian Thomas, refers to a video of

³ See R. 00035-00038 and R. 00040-00041.

⁴ See R. 00036 (deposition of Adrian Thomas, page 92, lines 3-4 "MS. TOMLINSON: I don't know what you're talking about." and lines 9-10 "MS. TOMLINSON: No. I've never seen that one.")

⁵ See R. 00045 (correspondence dated May 2, 2012 from Robert S. Addison attached as Exhibit "C" to Plaintiff's Motion – "I told you I would check into other video. The State of Mississippi requires casinos to keep surveillance video for 14 days. Gold Strike complies with this regulation and all video is taped over after 14 days if it is not specifically requested to be retained. **The outside video** was the only retention requested, so it is the only video that was not taped over after 14 days.") (emphasis added).

⁶ Defense counsel stated in this correspondence "**The outside video** was the only retention requested." Plaintiff's retention request (See R. 00030) contains no such limitation.

the initial incident inside the casino when he was first called to respond to the altercation between Plaintiff and Mr. Young inside the casino.⁷

4. Additionally, in his Motion for Spoliation and at trial, Plaintiff submitted to the Court that the entire altercation involving the Plaintiff and John Mack Young at the stage bar (inside the casino) was the “initial dispute.” This “initial dispute” occurred completely inside the casino, was centered in and around the “stage bar”, and consisted of the verbal threats Plaintiff received while inside the casino from John Mack Young and subsequently led to the casino security personnel asking both Plaintiff and John Mack Young to leave the casino premises.⁸ Absolutely no video footage of the “initial dispute” has ever been produced to undersigned counsel.

5. With regards to the second point, the appellant agrees with the Court *“that Thomas was clear that the video was of him talking to Lee after Young and Lee were already separated.”* However, the Appellant submits that, as stated earlier, this was during the “initial dispute” which was during the time the Appellant contends Young was verbally threatening him and attempting to assault him while INSIDE the casino. It was,

⁷ See R. 00035-00036. “Okay. Where you were initially called at the stage bar and where this initial verbal started, have you seen any video of that?” His response was “The only video I’ve seen is where I walks up and talked to Lee right there where Thomas [Timothy Thomas, the other security officer] was. And it should be on this video, right? It should be on this same one, right?”

At this point in the deposition, Adrian Thomas had seen the video footage OUTSIDE THE CASINO at the North exit which consisted of the assault outside injuring the Plaintiff followed by footage INSIDE THE CASINO but ONLY INSIDE THE HOLDING ROOM! The video footage of the initial altercation, which Plaintiff submits would’ve shown Young’s aggressive and threatening demeanor, has been conveniently lost and removed from the video provided in discovery. This footage is the SAME footage described in Plaintiff’s spoliation letter to the casino and was footage that was on the same tape reviewed by Adrian Thomas in court and the SAME TAPE returned to the casino by Adrian Thomas after he went to Justice Court on Mr. Lee’s charges.

⁸ It was during this “initial dispute” that the Plaintiff contends the Defendant knew or should have known about John Mack Young’s violent nature and is the “initial dispute” which occurred inside the casino and immediately prior to the Plaintiff and John Mack Young being “separated” by casino security, immediately prior to the Plaintiff being forced out the North Exit, immediately prior to Plaintiff requesting “an escort” to his vehicle, immediately prior to Plaintiff being forced into the casino atrium where John Mack Young was waiting, and immediately prior to Plaintiff being chased out the “North Exit” and viciously assaulted outside the casino by John Mack Young.

in fact, after Young and Lee had been separated by Veronica Jenkins and Adrian Thomas, respectively. In fact, Adrian Thomas testified that “Yes, at that point we can separate them. We can step in the middle and separate them, **which is what we done**, stepped in the middle and separated them.”⁹ It is the video of this “separation” by casino security (and the aggressive demeanor of Young which the Plaintiff submits is additional “notice” on casino personnel) which was the basis of Plaintiff’s Spoliation Motion.

6. In regards to the Court’s next two points, Plaintiff respectfully submits that per the testimony of Adrian Thomas, the casino provided him with a VHS tape to present to the Justice Court in response to a trial subpoena.¹⁰ This video was reviewed by the Justice Court judge and the charges against the Plaintiff were dismissed with prejudice. Adrian Thomas testified that before the court hearing he picked up he VHS tape in question from his supervisor at work and that after the court hearing he returned

⁹ See R. 00043; lines 19-22. (Emphasis added).

¹⁰ See P-19 (deposition of Adrian Thomas, page 116, line 19 through page 117, line 10).

19 Q What I'm talking about is you said
20 earlier you have seen video you when you initially
21 saw Mr. Lee.
22 A Uh-huh.
23 Q And that's why I was telling you. We
24 haven't seen that today, have we?
25 A No. I haven't seen that today, no.
1 Q But it does exist? You've seen it?
2 A Yes, I've seen it. I mean it may have
3 been on the -- when I seen it, it was on the tape
4 that I was given when I went to court --
5 Q Okay.
6 A -- with it.
7 Q Now, is that a VHS tape?
8 A Yes, it's a VHS tape.
9 Q A VHS tape?
10 A Uh-huh.

the same VHS tape to the casino pursuant to casino protocol. ¹¹ The video on this VHS tape was the subject of Plaintiff's counsel's retention/spoliation letter. ¹²

7. Lastly, Gold Strike's risk manager did testify regarding the casinos retention policy; however, Plaintiff respectfully submits this testimony and evidence is completely irrelevant. As argued to the trial court, ¹³ the risk manager testified they delete video after 14 days. The "initial dispute" occurred on March 9, 2008. Adrian Thomas testified under oath that the "missing video" was viewed by him on a VHS tape provided by his employer for justice court on June 11, 2008; over sixty (60) days after the incident at the stage bar. As argued at trial, Appellant respectfully submits that the casinos video retention policy is irrelevant since they had already retained this video footage well past the fourteen (14) days they testified to. Plaintiff respectfully submits it is proper evidence for the Court to instruct the jury as to a negative inference due to its absence. Especially given the fact that the evidence in question goes directly to a critical aspect of Plaintiff's case in chief (i.e. notice on the part of the casino).

DEFENDANT'S INTERROGATORY RESPONSES

8. In the Court's decision, the Court ruled that "*The defendant's supplemental responses do not contradict their initial responses but only provide additional information that is not supportive of Lee's claims.*" Respectfully, the Appellant

¹² This VHS video should have been retained by the defendant casino per the retention letter. This VHS tape contained the video discussed by Adrian Thomas in his deposition and Plaintiff submits this tape contained footage of the "initial dispute" and memorialized the "notice" of John Mack Young's violent, aggressive and threatening behavior.

¹³ See 225:23-228:17.

would submit the responses do appear to contradict each other and actually omit and change the casino's version of the facts in a number of ways.¹⁴

9. In regards to P-29, Appellant submits the following examples:

- a. In its initial answer, the casino stated ... "this lawsuit arises from a verbal dispute between Plaintiff and John Mack Young that originated in the casino's Stage Bar. Gold Strike security officer Timothy Thomas ("Tim Thomas") was approached by Plaintiff to assist in the alleged dispute at the Stage Bar between Plaintiff and other casino patrons."

In the supplemental answer, the casino stated ... "this lawsuit arises from a verbal dispute between Plaintiff and John Mack Young that originated in the casino's Stage Bar. Gold Strike security officer Timothy Thomas ("Tim Thomas") was approached by Plaintiff to assist in the alleged dispute at the Stage Bar between Plaintiff and Young."

- b. In its initial answer, the casino stated "Despite Tim Thomas's instructions for Plaintiff to remain by the North Exit while security was dispatched to the Stage Bar, Plaintiff went back to the Stage Bar a couple of times and exacerbated the situation."

In the supplemental answer, the casino stated "Despite Tim Thomas's instructions, Plaintiff went back to the Stage Bar and exacerbated the situation."

¹⁴ P-29 was Goldstrike's supplemental response to Plaintiff's Interrogatory No. 3 which stated "Please describe in detail all facts supporting your understanding of how the incident which is the subject of this lawsuit occurred.

- c. In its initial answer, the casino stated “Because both parties had become quite boisterous at the Stage Bar, Gold Strike security personnel requested that both parties exit the premises.”
- In the supplemental answer, the casino stated “Gold Strike security personnel ordered both parties to leave the premises for 24 hours.”
- d. In its supplemental answer, the casino also added “Mr. Young’s friends indicated to Gold Strike security personnel that they would escort Mr. Young to the Horseshoe. After Mr. Young and his friends exited the premises, ¹⁵Adrian Thomas repeatedly requested that the Plaintiff leave as well. When the Plaintiff finally agreed, Adrian Thomas escorted him off the gaming floor towards the North Exit.”
- e. In its initial answer, the casino stated “At the time of Plaintiff’s removal from the casino, Gold Strike did not have any indication that a physical altercation would ensue outside its North exit.”
- In the supplemental answer, the casino stated “At the time of Plaintiff’s ouster from the casino, Gold Strike did not have any indication that a physical altercation would ensue outside its North exit. Additionally, at the time of Plaintiff’s ouster from the casino, Gold Strike believed that Mr. Young had already exited the premises and was en route to the Horseshoe Casino.”

¹⁵ It is clear from the testimony and the videotapes that Mr. Young and his friends never exited the premises. The fact that casino personnel did not confirm this according to their very own protocol is part of Plaintiff’s cause of action against the casino.

- f. In its initial answer, the casino stated “Upon presently available information, Plaintiff approached and/or confronted Young once outside the casino which resulted in a physical altercation between Plaintiff and Young.”

In the supplemental answer, the casino stated “According to the surveillance footage, Mr. Young approached the Plaintiff from behind as Plaintiff exited the casino, which resulted in a physical altercation between Plaintiff and Mr. Young outside the casino.”

- g. In its initial answer, the casino stated “Once it was determined that both parties were responsible for the physical altercation,¹⁶ Plaintiff was brought into the interview room as well.”

In the supplemental answer, the casino stated “Once it was determined that both parties were involved in the physical altercation and Veronica Jenkins concluded Plaintiff was refusing to leave the casino, Plaintiff was taken to the interview room as well.”

10. Appellant respectfully submits these are very different versions of what happened that night and the redactions, modifications and additions in the casino’s versions of the events go directly to Plaintiff’s continued status as a business invitee, the casinos breach of their own rules and regulations, and the “notice” the Court previously found was absent. For example, according to the casino, the initial disturbance involved other casino patrons to the extent security instructed the Plaintiff to remain by the North Exit while security was dispatched to the Stage Bar ; however,

¹⁶ This is consistent with the testimony of Veronica Jenkins. See 360:7-12.

additional altercations occurred a couple of times resulting in both parties becoming quite boisterous at the Stage Bar and requiring two security officers to keep them separated. Appellant would submit this version of events is markedly different and appear to show the casino was on notice of much more that evening.

DIRECTED VERDICT

11. In the Court's decision, it held "*There is no evidence that Young had been involved in any prior altercation at the Gold Strike or that the casino had any knowledge of his allegedly "violent nature" other than what its employees witnessed at the bar that evening, which was not evidence of a violent nature at all.*" This issue was recently addressed by the Mississippi Supreme Court. In Galanis v. CMA Mgmt. Co., 175 So.3d 1213 (Miss.2015) the Mississippi Supreme Court held that a resident-concern form submitted by a resident of the premises was sufficient evidence for actual notice of a resident's violent tendencies for purposes of the duty owed by the defendant land owner.

12. Chris Lee testified during direct examination that "he was threatening me; basically, saying that, you know, to physically harm me. Using a lot of profanity." 256:24-26. He went on to testify that he told Goldstrike Security, specifically Adrian Thomas "I'll leave, if you give me a – if you escort me out, you know, escort me to my car. But I don't – I don't feel like it's right to throw me out the door where the guy who's been verbally threatening me is going to be standing there." 257:21-26. He later testified that he asked security for an escort "when they were forcing me towards the door when I knew a guy could be out there waiting on me." 289:27-29.

13. In it's decision, the Court held the casino could not foresee Young's physical assault solely because Young and Lee verbally argued and were asked to leave a bar inside the casino. Respectfully, Appellant would submit the casino security personnel were on direct notice by the Plaintiff that he had been verbally threatened with actual physical harm and he specifically requested an escort to his vehicle as a result. Appellant would respectfully submit that the "forseeability" that he could be attacked was certainly obvious and was the reason he requested security to escort him to his vehicle prior to being forced into the atrium at the North exit.

14. Appellant also contends the casino was actively negligent in following their own security protocols. In Olier v. Bailey, 164 So. 3d 982 (Miss. 2015) the Mississippi Supreme Court ruled that the exception recognized in Hoffman v. Planters Gin Co., Inc., 358 So.2d 1008 (Miss. 1978) was limited to cases involving property owners/ occupiers who are aware of the invitee's/licensee's/trespasser's presence and are actively negligent in the operation of a business. In this particular case, the casino failed to comply with it's own rules and regulations regarding patrons involved in a verbal dispute; and the casinos own security shift manager on duty that night (Veronica Jenkins) testified that the reason Plaintiff was injured was due to defendant's failure to follow their own policy regarding escorting patrons off the casino property and that this failure was a direct and proximate cause of the Plaintiff's injuries and damages.

15. The Court's decision essentially held that it was unforeseeable that two patrons who had been in an altercation in which security intervened and separated the patrons could subsequently end up continuing the altercation on casino property minutes later; however, that is the exact situation that is addressed in the casino's

security manual and testified to at trial. In fact, Veronica Jenkins, the security shift supervisor on duty that night for Goldstrike, testified that “it’s the casino’s job, when people have an altercation at the casino, to keep them separated and to keep both parties separate.” 346:4-8. She had also testified that “normal protocol is that the person is escorted to the exit of the casino to make sure that they’ve actually left the casino grounds... and that in this case that did not happen.” 346:25-29, 347:1-9.

16. The casino representative, Tina O’Keefe agreed to this as well at trial. She testified that the casino’s protocol was for security personnel to “walk them out the door” 99:21 and to “watch to see that they go out the door.” 100:5. Casino security did not follow casino protocol or guidelines that night and “see that they go out the door.” In fact, Ms. O’Keefe testified that “Mr. Young never left the casino” and that it “seems like he was hiding ... sitting there waiting” 145:2-8. Plaintiff contends that this failure of the casino security personnel to follow their own security protocols was the direct and proximate cause of Mr. Lee’s assault and injuries. In fact, Veronica Jenkins testified that “the casino’s failure to escort him out was what ultimately caused [Chris Lee’s] injuries.” 349:14-18.

17. The Court also ruled that Appellant’s classification as an “invitee” changed after he was initially asked to leave the property (trespassed) but before he was assaulted by Young. First, Appellant contends he did not lose this status based upon the casinos own guidelines and initial Interrogatory answers. Second, Appellant contends his status cannot change with regards to an active and continuing duty. Third, Appellant submits his classification could not change until after the casino completed

their own protocol regarding the trespass of guests and he was “escorted off property.”
See P-22, page 78.

18. With regards to the malicious prosecution charge and the other intentional torts in general, the Court ruled “Although the charge was eventually dropped, there was probable cause for Lee’s arrest at the time it was initiated.” Respectfully, the Appellant submits that the testimony of the corporate representative establishes there was no probable cause at the time he was handcuffed and detained inside the casino. When asked if Mr. Lee was under arrest at that point ¹⁷ Ms. O’Keefe testified “I don’t know if exactly 3:43 we figured that out. I’m not sure.” 120:24-29. Additionally, the casino testified that the Appellant was arrested for “disturbing the peace” because he refused to leave the property. This, too, was in direct violation of their own Rules and Regulations which state “A person refusing to leave the property, after being read the trespass warning and instructed to leave, will be arrested for trespassing.” See P-22.

WHEREFORE, Appellant prays that the Court of Appeals rehear this matter, and after doing so, determine the lower Court’s Order directing verdict be reversed and remanded for trial.

Respectfully Submitted,

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s/ Benjamin L. Taylor
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¹⁷ When he was handcuffed in the casino holding room.

CERTIFICATE OF SERVICE

I, Benjamin L. Taylor, do hereby certify that a true and correct copy of the above and foregoing Motion for Rehearing has been filed electronically via ECF with the Mississippi Supreme Court Clerk's Office and also forwarded via electronic mail this day to the following:

Honorable Albert B. Smith, III, ctadmin@bellsouth.net

Honorable Robert S. Addison, Esquire, raddison@danielcoker.com

Honorable Sandra D. Buchanan, Esquire, sbuchanan@danielcoker.com

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This the 23rd day of February, 2016.

s/ Benjamin L. Taylor

Benjamin L. Taylor, MSB#100240
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